

Daniel

28 JULY

MEMO - X-EXAM

* THIS IS MY SUGGESTED STOCK OF X-EXAM QUESTIONS TO SHOW BOTH THE INTENDED PURPOSE OF E.O. 10501 AND PRACTICAL PROBLEMS IN ITS IMPLEMENTATION, QUESTIONS 1 to 100.

* NOTE THE ABSENCE OF ANY DEFINITION OF "NEED-TO-KNOW" FOR USE BY DOD PEOPLE, AS REFLECTED AT END OF ATTACHED QUESTION 97.

FOR USE, IF APPROPRIATE TO EXPLORE THE ISM AS SUCH ON X-EXAM, QUESTIONS WILL BE AVAILABLE TO PROVE THAT DR. ELLSBERG WAS AN AUTHORIZED PERSON, AND HAD AUTHORIZED POSSESSION. The questions will reflect comments in my memo of 5 March 1972 to Charles Nesson.

-Bill Florence

AUTHORITY TO CLASSIFY

57. Let us consider the question of who may apply the Top Secret classification, the Secret classification and the Confidential classification to defense information as referred to in section 1 of the Executive order. The limitation of authority to classify information is covered in section 2 of the order, Is that right?

NOTE: Yes.

58. Who is authorized to classify information under the order?

NOTE: Heads of designated agencies in the Executive branch, and such other persons as he, OR HIS REPRESENTATIVE, may designate.

~~59~~

59. What procedures are used to designate people who are authorized to apply ~~the~~ a defense classification to information? Are people designated in writing?

NOTE: Yes.

60. Are they designated by positions they occupy?

NOTE: Yes

61. In designating positions as the basis for authorizing persons to classify information, does the written order list specifically each position in the agency, or does it list types of positions?

note: Types of position. ~~for information~~

62. Then, a listing of authorization to classify is NOT an exact listing of people in an agency who actually classify information? Is that Right?

NOTE: Yes.

63. If an agency wanted to know how many people were exercising authority to apply a security classification (for example, the Secret classification) would it be necessary to canvass the agency's organizational elements and ask how many were exercising classification authority?

NOTE: Yes.

~~64. There is a designation used by the Department of Defense, "Derivative Classification Authority."~~

64. Are you familiar with the Department of Defense Instruction 5210.47, entitled "Security Classification of Official Information"?

note: Presumably YES.

65. I call your attention to subsection V.B., headed "Derivative Classification." Please explain what "Derivative Classification" means.

NOTE: A Derivative classification is a TOP SECRET, Secret or Confidential classification that is applied to information which:---

Is "substantially" the same as, or "CLOSELY RELATED" to OTHER information bearing a classification. [THIS IS THE DISTILLATION of V.B. I. a, b and c, DODI 5210.47.]

66. Is it true that if an individual has information which he considers to be closely related to other classified information, he may assign a classification to his item of information?

NOTE: Yes.

67. He may ~~classify~~ the information without ~~even~~ being listed by name or by position to assign the classification?

NOTE: Yes.

68. ^{there} would it be correct to say that ~~there is no limitation in the~~ DOD Instruction as to how many people may assign derivative classifications of Top Secret, Secret and Confidential to Information?

NOTE: YES.

69. Would it be correct to say that the Department of Defense, in fact, did authorize any body in the Department to apply security classifications to information?

NOTE: **YES.** [any effort to minimize this fact by attempts to claim Command review and disapproval of classifications would be irrelevant. [THERE WERE NO DISAPPROVALS, ANYWAY, EVEN THOUGH THE DODI SUGGESTED THE POSSIBILITY.]

DISSEMINATION

70. Let us now examine the instructions in Executive Order 10501 about disseminating classified defense information. That subject is covered in section 7 of the order. Is that right?

NOTE. Yes.

^{general} 71. Please state what the rule is for disseminating classified defense information.

First sentence, Sec. 7:

NOTE: "KNOWLEDGE OR POSSESSION OF CLASSIFIED DEFENSE INFORMATION SHALL BE PERMITTED ONLY TO PERSONS WHOSE OFFICIAL DUTIES REQUIRE SUCH ACCESS IN THE INTEREST OF PROMOTING NATIONAL DEFENSE AND ONLY IF THEY HAVE BEEN DETERMINED TO BE TRUSTWORTHY."



72. Who is required by the order to assure that dissemination of classified defense information is controlled?

NOTE: Sec. 7 (a): Heads of Departments and agencies shall prescribe such ^{accountability} procedures as are necessary to control effectively the dissemination of classified defense information, [with particularly severe control on material classified TOP SECRET under this order].

73. Therefore, the rules for disseminating classified defense information within an agency or by an agency are those prescribed by the head of the agency? Is that right?

NOTE: YES.

74. Is the head of an agency required to give any special attention to the possibility of classified defense information being disseminated outside of the Executive Branch?

NOTE: Yes. [See 7(c)]

75. What is the requirement in the Executive order?

NOTE: Sec 7(c): "CLASSIFIED DEFENSE INFORMATION SHALL NOT BE DISSEMINATED OUTSIDE THE EXECUTIVE BRANCH EXCEPT UNDER CONDITIONS AND THROUGH CHANNELS AUTHORIZED BY THE HEAD OF THE DISSEMINATING DEPARTMENT OR AGENCY, [even though the person or agency to which dissemination is proposed to be made may have been solely or partly responsible for its production]."

76. It would be correct to say that Conditions authorized by the head of the disseminating agency, NOT EXECUTIVE ORDER 10501, apply to classified defense information released to persons outside the Executive branch? Is that right?

Note: Yes.

77. Different Executive branch agencies could prescribe different Conditions under which classified defense information could be disseminated and used outside the Executive branch? ~~Is that right?~~
Is that right?

NOTE: YES.



78. Then, there could be a variety of procedures applicable to the use of classified defense information disseminated outside the Executive branch?

NOTE: YES.

78. Are you familiar with procedures of the Department of Defense for disseminating classified information outside the Executive branch, as prescribed in DoD Directive 5200.1, entitled "Safeguarding Official Information in the Interests of the Defense of the United States"?

NOTE: Presumably, YES.

79. I call your attention to section VII. D. 1 ^{under the} ~~any~~ heading "Dissemination". Will you please read subsection 1? "Classified

79: CONTINUED

information may be made available to persons or agencies or agencies outside the Executive branch provided that such classified information is necessary for their performance of a function from which the Government will derive a direct benefit and a net advantage, and that such release is not prohibited by the originating department or agency.

Heads of DOD Components shall designate appropriate officials who will determine, prior to the release of classified information under this provision, the propriety of such action and assurance of the recipient's trustworthiness and need-to-know."

~~80. Are you familiar with~~
~~with~~



80. Would it be correct to say that under DoD Directive 5200.1, the Assistant Secretary of Defense for International Security Affairs may determine or designate officials in his office to determine the propriety of a proposal to release classified defense outside the Executive Branch?

NOTE: YES. DoD Dir. 5200.1 defines "DoD Components" as including "Office of the Secretary of Defense." and an Assistant Secretary acts for the Secretary in his own functional area.

81. Are you familiar with the Office of the Secretary of Defense Security Manual Chapter 1, "Safeguarding Classified Information," promulgated as Administrative Instruction No. 8/1, 16 September 1968?

NOTE: YES (presumably #5200.1) & implements

82. I call your attention to ~~sub~~section VII. J. 5 of Chapter 1. That subsection is headed, "Dissemination of Classified Information Outside the Executive Branch," and reads as follows: "Except as provided in 7. below, No person in OSD shall convey orally, visually, or by written communication any classified information outside the Executive Branch of the United States Government unless the disclosure has been specifically authorized by the head of the organizational entity that originated the material."

You will note that subsection 7. is headed "Disclosure to the Congress of the United States."

So, would it be correct to say that ~~the document~~

82 [CONTINUED]

the Assistant Secretary of Defense for International Security Affairs and designated officials in his office are authorized to release classified material to persons or agencies outside the Executive Branch, provided that the Releasing Office:

a) Determines that the classified material is necessary for the recipient person or agency to perform a function from which the Government will derive a direct benefit and a net advantage, and

~~b) Determines that the~~
b) Examines the question of propriety, and determines that the release is proper, and

~~c) Determines the Trust~~

c) Assures the recipient's trustworthiness and need-to-know, and

d) Either originated the material or determined that the originating agency had not prohibited the release?

To repeat, would that be correct?

NOTE: YES.

83. It would be correct to say that the release of the ^{classified material} by the ^{Assistant Secretary of Defense (ISA) as} referred to in the previous question, was authorized ~~under~~ ^{under} section 7 of Executive Order 10501, as implemented for the Department of Defense, as a whole, by DoD Directive 5200.1 and for the Office of the Secretary of Defense by

Chapter 1 of the Office of the Secretary of Defense Security Manual?

Note: YES

84. I call your attention to subsection VII.M. ~~■~~ of Chapter 1, Office of the Secretary of Defense Security Manual, headed: "Disclosure ~~of~~ to Foreign Governments and Foreign Nationals."

~~Is classified defense information disclosable~~
Is the release of classified defense information to foreign governments and foreign nationals permitted under section 7, Executive Order 10501?

NOTE: YES [The witness might inject that an additional specific "National Disclosure Policy" applies, But the comment would be irrelevant.]

85. Is there any classification limit on the release of information to foreign countries? In other words, IS THERE ANY POLICY WHICH SAYS THAT NO INFORMATION QUALIFYING FOR THE TOP SECRET CLASSIFICATION ~~OR NO~~ MAY BE RELEASED OUTSIDE THE UNITED STATES?

NOTE: NO. [The witness might inject that only certain designated countries would be authorized to receive TOP SECRET information, but the comment would be irrelevant.]

86. Would it be correct to say that, ~~information~~ ^{UNITED STATES} information is denied to United States citizens under Executive Order 10501 but is released to foreign governments and foreign nationals ~~under the same order?~~

under that order?

NOTE: YES.

87. Is that common practice by the Executive Branch?

NOTE: YES. [BY THE "LONG-TON" DAILY]

88. Referring again to the fact that the Assistant Secretary of Defense for International Security Affairs is authorized to release items of classified material outside the Executive ~~branch~~

branch, as provided in DoD Directive 5200.1 and the OSD Security Manual, is there any requirement that he ^{MUST} execute a formal contract under official procurement regulations before the

material may be released
to an agency or individual?

NOTE: NO.

89. However, if the release
of classified material was
to be made for the performance
of a procurement ~~or~~
~~supply~~ contract, such
~~release necessarily would~~
release would be expected
to be in consonance with
procedures and conditions
applicable specifically to
~~the contract~~
procurement operations?

~~90.~~ NOTE: YES.

90. Would it be correct
to say that the Secretary
of Defense can establish
certain conditions for
the release ~~and~~ of
material¹ of classified
to a commercial
firm for the performance

procurement
of a specific contract, and
certain other conditions
for the release of classified
material to the same
firm for a purpose
not involving the
performance of any ~~contract~~
~~contract~~ Contract?

NOTE: YES.

91. In deciding the conditions
of release of an item of
classified defense ^{information}, outside
the Executive branch, is
the Secretary of Defense
or the official exercising
his authority permitted
by section 7 of Executive
Order 10501 to decide
whether to require the
application of ^{the} personnel
security clearance procedure
or some different procedure
to determine trustworthiness
of recipients of the
information?

NOTE: YES.

92. Then, if the Secretary of Defense or an official acting for him released this Vietnam Study to ~~the staff~~ an individual or agency outside the Executive branch according to DoD Directive 5200.1 and the OSD Security Manual, but did not invoke contractual procedures and conditions prescribed in procurement regulations, would the release be in consonance with Section 7, Executive Order 10501?

NOTE: YES.

93. Would it be correct to say that the recipient would be obligated to follow instructions specifically agreed as applying to the Vietnam Study rather than different instructions

applying to other classified material?

NOTE: YES.

94. Therefore, if the recipient of a copy of the Vietnam Study has mutually agreed procedures from the Secretary of Defense or the official acting for him ^{specifying} ~~stating and providing~~ for the conditions for using and handling the Vietnam Study, those agreed procedures would take preference over other Department of Defense procedures?

95. [ASSUME THAT THE ISM HAS ALREADY BEEN INTRODUCED BY THE GOVT]

Then it would be correct to say that the DoD Industrial Security Manual ~~would not apply to~~

would not apply to the handling of a copy of the Vietnam Study held by a person or agency having separate instructions for handling the study?

NOTE: YES.

96. [ASSUME THAT THE RAND SECURITY MANUAL HAS BEEN INTRODUCED]

Also, it would be correct to say that the RAND Security Manual, issued as the "standard practice procedure" required by the Industrial Security Manual, would not apply to the handling of a copy of the Vietnam Study held by the RAND Corporation if the Corporation had received different instructions from the Department of Defense for handling that particular study?

NOTE: YES.

SUMMARY

97. In summation, would it be correct to say: —

a) Although Executive Order 10501 was intended to permit only the classification and safeguarding of official information the unauthorized disclosure of which at the least could be prejudicial ~~to the United States~~ to the defense interests of the Nation, the practical application of the order extended far beyond its stated purpose, and security classifications were applied to and retained on considerable volumes of information which did not require protection in the interests of national defense?
Is that right?

NOTE: YES.

97-CONT

B) The authority to classify information, and thus keep it from the citizens of this country, was exercised by many thousands of people ~~and~~ beyond the limited numbers envisioned by the Executive order?
Is that right?

NOTE: YES.

C) The authority to disclose classified defense information outside the Executive branch under the Executive order is a broad authorization which may be exercised differently by different agencies and involve a variety of conditions for safeguarding, including procedures adapted to ~~foreign~~ different foreign countries?
Is that right?

NOTE: YES

97 - Continued

d) According to the Department of Defense Implementation of Dissemination policy in Executive Order 10501, a disclosure of classified information to a person outside the Executive Branch would be an authorized disclosure, and the recipient would be an authorized person, if the specified authority had determined: [REDACTED]

1) The classified information was necessary for the recipient's performance of a function from which the Government would derive a direct benefit and a net advantage, and

2) The propriety of the release, and

3) The recipient's trustworthiness and



97 d) - continued
need-to-know?

Is that right?

NOTE: YES.

COMMENT ON "NEED-TO-KNOW"

There is no definition
in DoD Directive 5200.1
or the OSD Security Manual
for "need-to-know."

THE DEFINITION IN THE
INDUSTRIAL SECURITY MANUAL
APPLIES ONLY TO SOMEONE
WHO HAS ACCEPTED THE
ISM BY SIGNING THE DoD
INDUSTRIAL SECURITY AGREE-
MENT.

DO NOT RAISE ANY QUESTION
ABOUT THE MEANING IN THE
DEPT OF DEFENSE, AND
DO NOT PERMIT ANYONE TO
"DEFINE" IT FOR USE
OTHER THAN IN THE ISM.

98. Have you ever known of a case involving either administrative sanction or prosecutive action for applying or retaining a security classification on information in the public domain or any other information the unauthorized disclosure of which would not have prejudiced the defense interests of this nation?

NOTE: PRESUME: NO.

99. Have you ever known of a case involving either administrative sanction or prosecutive action for the ~~application~~ of a security classification to an item of information by a person who had not been ~~designated~~ to ~~sign~~ exercise such classification authority?

NOTE: PRESUME NO.

100. Have you ever known
of a case involving
prosecutive action
against a private
citizen in this country
disclosing information
allegedly relating to the
national defense to
another person in the
absence of a charge that
there was reason to believe
the information could be
used to the injury of the
United States or to the
advantage of any foreign
nation?

NOTE: Presume that the
answer will be
NO; OR YES,
DR. ELLSBERG.